5-15-2012

State v. Skogen Appellant's Reply Brief Dckt. 38701

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	DOCKET NO. 38701
	)	
v.	)	
	)	
AMANDA LEANN SKOGEN,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Amanda Skogen demonstrated that the sentence imposed by the district court in her case was improper on a multitude of grounds, including that it was improperly based solely on the flawed concept of general deterrence, that it did not even serve that flawed objective, that it was based on an insufficient consideration of various mitigating factors, and that it improperly created a new mandatory sentence for caregivers and babysitters. Based on these many abuses of discretion, Ms. Skogen respectfully requested relief from this Court.

The State responded with several arguments which Ms. Skogen believes necessitate a reply, particularly because the State glosses over the crux of her argument and focuses on solely procedural grounds in an attempt to distract this Court from the real issue in this case: the abuse of discretion arising from courts relying on flawed justifications within the greater sentencing scheme in order to impose excessive sentences.

Specifically, the grounds to challenge the use of general deterrence alone to justify an excessive sentence were preserved and are within the purview of this Court's jurisdiction and Ms. Skogen did not invite the error by simply acknowledging that deterrence and punishment are recognized sentencing objectives. This is because she contended that her overall sentence should have been more lenient under the broader sentencing scheme, which the State appears to misunderstand. And under that current sentencing scheme, Ms. Skogen's argument – that relying on only general

deterrence to justify the punishment of imprisonment – was preserved and the failure to adhere to the sentencing scheme constitutes an abuse of discretion by the district court.

Additionally, the State did not refute the merits of Ms. Skogen's argument in regard to the continued viability of general deterrence as a sentencing objective, nor did it present a justified reason for this Court to not address them. Furthermore, even if general deterrence is still acceptable to this Court, Ms. Skogen's sentence does not serve that objective, and her analysis of that objective (and the need for certainty therein), does not deprive the district courts of discretion at sentencing. Finally, a sufficient consideration of the various mitigating factors, without considering inappropriate factors in aggravation, reveals that the sentence is, in fact, excessive and thus constitutes an abuse of discretion.

Therefore, this Court should vacate Ms. Skogen's sentence and remand her case for appropriate sentencing, or alternatively, reduce her sentence as this Court deems appropriate.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Skogen's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Whether Ms. Skogen's challenges to the use of general deterrence, both as a part of the sentencing scheme and as applied in her case specifically, are properly before this Court, and a proper analysis of that objective should result in a more lenient sentence.

2. Whether the district court abused its discretion by imposing an excessive sentence on Ms. Skogen.

ARGUMENT

I.

Ms. Skogen's Challenges To The Use Of General Deterrence, Both As A Part Of The Sentencing Scheme And As Applied In Her Case Specifically, Are Properly Before This Court, And A Proper Analysis Of That Objective Should Result In A More Lenient Sentence

A. Introduction

Ms. Skogen has challenged the use of only general deterrence to justify her sentence as improper in two ways. First, she contended that relying solely on general deterrence within the greater sentencing scheme to justify a sentence of imprisonment constitutes an abuse of discretion, as the concept of general deterrence has been demonstrated to be flawed. Second, she challenged the district court's analysis and application of that objective in her case specifically. In that regard, Ms. Skogen argued that the district court's failure to consider other similar sentences deprives both her sentence and those other sentences of any general deterrent force they might have had because it deprives them of consistency. Both of these issues are properly before this Court, which should remedy the district court's abuses of discretion in these regards.

B. By Failing To Address The Substantive Arguments Made In The Appellant's Brief, The State Conceded Those Issues

The State, in its Respondent's brief, opted to only pursue procedural issues and to not address the merits of Ms. Skogen's substantive challenges to the district court's actions in this case. (*See* Resp. Br., pp.10-13 (contending that Ms. Skogen's arguments in this regard should be rejected only because they were not preserved, separation of powers would prevent this Court from holding in favor of Ms. Skogen, and

comparative sentencing is inappropriate under Idaho's sentencing scheme).) None of these arguments speak to the substantive argument Ms. Skogen made in her opening brief – that the concept of general deterrence itself, regardless of how or why it has been incorporated into the Idaho sentencing scheme, has been demonstrated to be an erroneous concept. (App. Br., pp.10-15.) Ms. Skogen pointed to problems with the logic and effect of the concept of general deterrence, all of which go unanswered by the State. Therefore, because it failed to provide argument or authority in regard to the merits of that challenge, it has waived any such challenge. *See State v. Zichko*, 129 Idaho 259, 263 (1996); *State v. Diaz*, 144 Idaho 300, 303 (2007); *State v. Li*, 131 Idaho 126, 129 (Ct. App. 1998); I.A.R. 35(b)(6).[1] Thus, if Ms. Skogen demonstrates that there are no procedural bars to her arguments (of which there are none), the State cannot argue against the substantive merits of her case and this Court should grant her relief.

[1] While *Zichko*, the leading case on this issue, dealt with an appellant's failure to comply with the rules, the opinion is actually broader, holding: "A *party* waives an issue cited on appeal if either authority or argument is lacking." *Zichko*, 129 Idaho at 263 (emphasis added). This holding is in accordance with I.A.R. 35, which places similar burdens and requirements on both the appellant and the respondent when they prepare to file a brief. *See* I.A.R. 35 (a)-(b). In addition to being harmonious with Idaho's appellate rules, it is also in accordance with the United States Supreme Court's determination that where a procedural rule benefits one party, a reciprocal protection must be given to the other party, else it causes fundamental unfairness in the proceedings in violation of the Fourteenth Amendment's due process protections. *Wardius v. Oregon*, 412 U.S. 470, 471-72. Therefore, the State's failure to provide argument against the substantive contentions Ms. Skogen set forth in her Appellant's Brief results in its waiver of those issues.

C. The Use Of General Deterrence Alone To Justify A Sentence Is An Abuse Of Discretion Because Doing So Runs Contrary To The Sentencing Scheme As A Whole

Ms. Skogen demonstrated the reasons why relying on general deterrence alone in sentencing is invalid. (*See* App. Br., pp.10-19.) She presented this Court with arguments backed by scientific analysis which reveal that general deterrence, particularly where the sentencing courts are afforded such broad discretion as they are in Idaho, cannot have a cognizable impact on the public's actions. (App. Br., pp.10-14.) She also presented this Court with other arguments, again supported by scientific analysis, revealing that the concept of general deterrence cannot be applicable in voluntary manslaughter cases due to the nature of such actions to be "upon a sudden quarrel or the heat of passion." (App. Br., pp.14-15.) Finally, she presented yet other findings, still backed by scientific analysis, that in the absence of any need to provide specific deterrence and rehabilitation, incarceration only serves to increase the risk that a person will pose to society upon release. (App. Br., pp.16-19.)

The State's only response to these arguments, besides whether they are properly before this Court, was that since the Legislature included general deterrence as a factor for the courts to consider,[2] this Court must disregard Ms. Skogen's arguments in terms of the viability of general deterrence as a sentencing factor.[3]

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[2] The State also argued that comparative sentencing was inappropriate, and thus Ms. Skogen's arguments should be disregarded. (Resp. Br., pp.11-13.) That argument is more properly couched in terms of the specific analysis of the effect of general deterrence in Ms. Skogen's sentence, and so it will be discussed in Section I(D), *infra*.

[3] The Idaho Supreme Court has clarified that the factors listed in I.C. § 19-2521 are merely a set of guidelines for the district court. *State v. Stover*, 140 Idaho 927, 931 (2005). In that statute, the Legislature listed certain factors that the Legislature suggested that the sentencing courts consider when imposing sentences. *Id.* As such, the statute does not mandate which factors the sentencing court must consider, but

(*See* Resp. Br., pp.10-13.) That position misunderstands the sentencing objectives as they have been established by both the Legislature and the Judiciary. General deterrence is but one of several factors it is suggested that the sentencing court consider when imposing a sentence designed to provide the greatest protection to society. Therefore, when the other objectives indicate that incarceration is not appropriate or necessary to provide protection to society, then general deterrence cannot be the sole factor which justifies such a sentence, especially because of the flaws with the concept itself.

As a result, the district court's explicit reliance on general deterrence to justify the harsher punishment of imprisonment when it had already found the other factors demonstrated there was no need to protect society through imprisonment constitutes an abuse of its discretion. This Court should remedy that abuse.

1. The Challenge To The Use Of General Deterrence Alone Was Preserved By Defense Counsel's Arguments In Regard To The Sentencing Scheme As A Whole

The Idaho Supreme Court has clearly established that the governing criteria, or sentencing objectives, are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *See, e.g., State v. Jackson*, 130 Idaho 293, 294 (1997). It has just as

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rather, leaves sentencing to the court's discretion. *Id.* at 932; *State v. Vondenkamp*, 141 Idaho 878, 888 (Ct. App. 2005); *State v. Mercer*, 143 Idaho 123, 128 (Ct. App. 2005). Therefore, while I.C. § 19-2521 does list general deterrence as a factor that sentencing courts *may* want to consider, they do not have to. Thus, if this Court finds that the concept of general deterrence is no longer valid, it may instruct that the lower courts should not continue to consider it when they imposes sentences, and it may do so without infringing on the Legislature's authority.

clearly set forth that "The primary consideration is . . . the good order and protection of society. *All other factors are, and must be, subservient to that end.*" *State v. Charboneau*, 124 Idaho 497, 500 (1993) (quoting *State v. Moor*, 78 Idaho 359, 363 (1956) (emphasis added, ellipsis in original). This clearly instructs that where society does not demand protection from the defendant, none of the other three objectives (deterrence, rehabilitation, and retribution) may trump it, become the primary objective, and force incarceration for their sake alone. *See id.*

The Legislature placed a similar restriction on the three subservient objectives: "The court shall deal with a person who has been convicted of a crime *without imposing sentence of imprisonment unless*, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that *imprisonment is appropriate for protection of the public* because . . . ." I.C. § 19-2521(1) (emphasis added). The Legislature goes on to list six factors which the sentencing court should consider as increasing the need to overcome this implied presumption against incarceration in order to protect the public. I.C. § 19-2521(1)(a)-(f). It also sets forth nine factors which the sentencing court should consider as weighing "in favor of *avoiding* a sentence of imprisonment."[4] I.C. § 19-2521(2)(a)-(i). The construction of this statute, particularly through the language employed, clearly requires the sentencing court to hold the protection of society paramount. I.C. § 19-2521(1). It also clearly requires the district court to *avoid* imposing a sentence of imprisonment, only resorting

[4] The Idaho Supreme Court has clarified that the factors listed in I.C. § 19-2521 merely list various guidelines that the Legislature suggested that the sentencing courts consider. *State v. Stover*, 140 Idaho 927, 931 (2005). As such, the statute does not mandate which factors the sentencing court must consider, but rather, leaves sentencing to the court's discretion. *Id.* at 932.

to such an option if its consideration of the factors indicates that the only way to protect society is by incarcerating the defendant. *See* I.C. § 19-2521.

Under both the Legislature's construction and the Court's interpretation, the sentencing court must focus primarily on the protection of society. If society does not demand incarceration of the defendant in order to protect itself, none of the other secondary objectives alone may trump it. *See Charboneau*, 124 Idaho at 500 (holding that all the other sentencing factors are subordinate to the protection of society). Defense counsel specifically requested that the district court "pronounce a sentence based on factors outlined that the Court has to apply. Those factors are announced in the State versus Toohill decision."[5] (3/11/11 Tr., p.248, Ls.2-5.) In making this request, defense counsel preserved Ms. Skogen's challenge to the district court's subsequent misapplication of those factors. Ms. Skogen subsequently challenged the district court on those grounds. (*See, e.g.,* R., Vol.2, pp.487-88.) As such, the issue of whether the district court abused its discretion by basing its decision upon general deterrence alone when the district court had already indicated that society did not demand protection through incarceration from Ms. Skogen is properly before this Court.

2. The Use Of General Deterrence Alone To Justify A Harsher Punishment Constitutes An Abuse Of Discretion

Reliance on the flawed concept of general deterrence alone to justify a prison sentence constitutes an abuse of discretion because it does not adhere to the overall sentencing scheme established in case law and statute.[6] Ms. Skogen presented all the

[5] *State v. Toohill*, 103 Idaho 565 (Ct. App. 1982).

[6] Ms. Skogen recognizes that punishment is also one of the objectives and is served by a sentence of incarceration. However, she would point out that any imposed sentence

evidence necessary to determine that the concept is flawed, especially in the context of voluntary manslaughter, and that imposing a sentence of imprisonment without the need for rehabilitation and specific deterrence increases the risk the inmate would pose to society upon release in her Appellant's Brief and need not reiterate it here, although

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constitutes "punishment." *See, e.g., United States v. Knights*, 534 U.S. 112, 119 (2001) (recognizing that probation is akin to imprisonment, in that it is a punishment imposed for the violation of the law and restricts the person's freedoms as a result of its imposition). Therefore, as "punishment" is addressed in every case where some sentence is imposed, that objective is omnipresent, and as such, whether it is considered alongside any of the other objectives is irrelevant. The result is that the district court imposed a sentence based only on general deterrence, as any sentence it imposed would serve the retributive objective.

Furthermore, if Ms. Skogen is correct and general deterrence either was an inappropriate factor for consideration at sentencing or was not served by her sentence, the fact that her sentence still serves the objective of retribution is not enough to justify the sentence. The sentencing scheme does not permit the courts to impose overly-long prison sentences, even if one of the other objectives is potentially served in doing so. *See, e.g., Tapia v. United States.*, 131 S. Ct. 2382, 2391 (2011) (while interpreting a statute, the Supreme Court determined that the statute precluded courts from increasing the length of a sentence, even in order to provide for additional rehabilitation, as Congress had found that incarceration did not promote rehabilitation). As such, relying on only retribution to justify an overly-long sentence is also improper. *See, e.g., State v. Brown*, 131 Idaho 61, 72 (Ct. App. 1998) (increasing the length of a sentence just to penalize the defendant, in that case for exercising his rights, is inappropriate). Regardless, even sentences for imprisonment based on punishment and deterrence are inappropriate in cases where society does not demand that protection through incarceration. Therefore, even if the State is correct and the sentence does serve the dual goals of general deterrence and retribution, relying on them to justify incarceration in absence of a need to protect society by that same sentence is inappropriate under the sentencing scheme. *See, e.g., Charboneau*, 124 Idaho at 500.

The State cites to two cases which it claims support the premise that even retribution alone justifies a sentence for a term of imprisonment. (Resp. Br., p.13. (citing *State v. Sheahan*, 139 Idaho 267, 285 (2003); *State v. Whittle*, 145 Idaho 49 (2007).) The *Sheahan* Court indicated that the district court in that case also considered deterrence *and protection of society*. *See Sheahan*, 139 Idaho at 285. The *Whittle* Court also considered the fact that the defendant had been given the opportunity to serve a period of probation and in light of the new evidence arising from her commission of numerous felonies, upheld the sentence based on that new evidence. *Whittle*, 145 Idaho at 52. The sentences for those crimes, it held, was properly in place to serve *all four* of the objectives, and was only excessive in length. *Id.* at 53. As such, neither case stands for the proposition the State claims they do.

she incorporates it herein by reference thereto. (App. Br., pp.10-19.) As the State opted not to present argument in contravention to those points, any such arguments are deemed waived. *See, e.g., Zichko*, 129 Idaho at 263; I.A.R. 35(a)-(b).

The reason the reliance on this flawed factor cannot be the sole basis to impose a punishment of incarceration is based on the structure of the sentencing scheme established by the Legislature and the Judiciary. Both clearly establish that the primary goal is to protect society. I.C. § 19-2521(1); *Charboneau*, 124 Idaho at 500. All the other factors listed are suggestions of issues the sentencing court should consider, although it is not required to do so. *Stover*, 140 Idaho at 931-32. As a result, "[a]ll other factors are, *and must be, subservient to that end*." *Charboneau*, 124 Idaho at 500 (emphasis added). Therefore, where the need to protect society does not demand incarceration, the sentencing court should avoid imposing it as a sentence. I.C. § 19-2521(1); *Charboneau*, 124 Idaho at 500.

The district court explicitly found: "Considering protection of society first, I don't believe that Ms. Skogen would commit such an act again . . . repeat of this action by her would be remote." (3/11/11 Tr., p.261, Ls.3-7.) It also found: "I don't think that it's a situation of specific deterrence to Ms. Skogen." (3/11/11 Tr., p.261, Ls. 13-15.) These two determinations reveal that Ms. Skogen presents no threat to society. Additionally, the district court found that, in terms of rehabilitation, Ms. Skogen was in no more need of treatment through counseling than any other person affected by these events. (3/11/11 Tr., p.261, Ls.8-12.) When there is no longer an ability of the penal system to reduce the risk (if any) that a defendant poses to society through rehabilitation, imprisonment is no longer appropriate. *See, e.g., Cook v. State*, 145 Idaho 482, 489

(Ct. App. 2008) (recognizing that where age or rehabilitation have made the defendant's situation such that they no longer present a risk of recidivism, continued incarceration is inappropriate); *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988) (same). This is particularly true when the person in question had a stable background and had been a law-abiding member of society for the majority of their adulthood.[7] *Cook*, 145 Idaho at 489. Therefore, as there was no specific need to rehabilitate Ms. Skogen, *Cook* and *Eubank* would instruct that continued incarceration is an inappropriate result because, as the district court explicitly found, Ms. Skogen did not present a risk for recidivism. (3/11/11 Tr., p. 261, Ls.3-7.)

These findings in regard to the majority of the other sentencing objectives reveal that society has no reason to demand incarceration to protect itself from Ms. Skogen. Therefore, because incarceration is not required by the need to protect society, the paramount goal in sentencing, the decision to impose a sentence of incarceration constitutes an abuse of discretion. *See Charboneau*, 124 Idaho at 500; I.C. § 19-2521(1).

Furthermore, when looking at all the factors articulated by the Legislature and Judiciary, most indicate that a prison sentence is not appropriate in Ms. Skogen's case. Most tellingly, four of the six factors the Legislature lists as indicating a need for incarceration to protect society are *not* present in her case.[8] *See* I.C. § 19-2521(1).

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[7] As evidenced by the multitude of witness testimony, Ms. Skogen had a stable background. (*See generally* 3/11/11 Tr., pp.97-235.) She has no other discernible criminal history than this instance. (PSI, p.4.)

[8] As Ms. Skogen demonstrated, the premise behind using general deterrence as a sentencing factor is unreliable, and therefore, should not be weighed heavily, if at all. Furthermore, as will be discussed in Section (D)(2), *infra*, her sentence does not even actually serve that objective because of the lack of certainty between it and sentences

Ms. Skogen does not pose an undue risk to commit another crime. (*See* 3/11/11 Tr., p.261, Ls.3-15.) She is not in need of correctional treatment. (*See* 3/11/11 Tr., p.261, Ls.8-12.) There is no need to deter her specifically by incarcerating her. 3/11/11 Tr., p.261, Ls.13-15.) And finally, Ms. Skogen is not a repeat offender. (PSI, p.4.) Thus, a sufficient consideration of all six of these factors reveals that society does not demand imprisonment to provide protection.

In addition, four of the nine factors indicating that prison is inappropriate are also present in this case. *See* I.C. § 19-2521(2). Ms. Skogen did not contemplate that her actions would cause harm to C.J. (*See, e.g.*, 3/11/11 Tr., p.258, Ls.16-19.) She has no prior history of delinquency. (PSI, p.4.) As the district court found at sentencing, she is unlikely to engage in such criminal conduct again. (3/11/11 Tr., p.261, Ls.3-7; *see also* 3/11/11 Tr., p.185, L.25 - p.186, L.4 (Christopher Gay testifying that Ms. Skogen has been entrusted to watch his daughter on two subsequent occasions, empirically demonstrating that this factor favors no incarceration).) And, based on her character, it is unlikely that she will commit another crime, particularly since she has no other criminal history. (See 3/11/11 Tr., p.261, Ls.13-15; PSI, p.4.) A sufficient consideration of these factors only reinforces the conclusion that society does not demand protection through incarceration in this case.

Based on a consideration of all the factors in light of the ultimate goal of protecting society, this case does not require imprisonment. As such, relying on only one factor to justify such an intense punishment and using it to trump the primary focus

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in similar cases. Therefore, the general deterrence factor also does not indicate that society demands protection through incarceration for those reasons, leaving only one of the aggravating factors present in any form in Ms. Skogen's case.

of sentencing, is improper. It constitutes a severe abuse of discretion, undermining the entire sentencing scheme established by the Legislature and Judiciary. A sufficient consideration of all the factors indicates that Ms. Skogen poses a negligible risk to society and that society does not demand protection through incarceration in this case. As such, the district court's decision to rely on general deterrence alone to incarcerate her represents an abuse of discretion. This Court should remedy that abuse.

D. The Sentence Imposed By The District Court In This Case Fails To Promote General Deterrence, And As Such, The Sentence Fails To Promote Any Of The Recognized Sentencing Objectives Besides Punishment

Even if this Court decides that general deterrence should still be considered as a sentencing objective, the sentence imposed in this case does not promote that objective, as it undermines the certainty necessary to generate any general deterrent effect. Ensuring that there is certainty (achieved through continuity) between sentences does not deprive the sentencing court of its discretion in that regard.[9] It merely recognizes that if the sentencing court wants to rely on general deterrence to justify a sentence, it will necessarily have to consider other similar sentences when it acts, lest it destroy whatever value that factor provides in terms of protection for society.

1. The Challenge To The Misapplication Of This Factor In Ms. Skogen's Case Specifically Was Preserved By Defense Counsel's Arguments In Regard To The Need To Be Consistent From Sentence To Sentence

Defense counsel preserved this issue when it presented the district court with information regarding various similar sentences and requested that it consider them in

terms of its consideration of general deterrence.[10] (Tr., p.253, L.20 - p.254, L.10.) Furthermore, at the time defense counsel began to go through that information, the State objected to its use at sentencing. (Tr., p.251, Ls.4-9.) And while the district court allowed defense counsel to continue to discuss that information, it stated: "I tend to agree with [the prosecutor]. . . . I'll let you continue. But sentences in prior cases is not going to be a big factor in any decision I make."[11] (Tr., p.251, Ls.10-22.) Defense counsel responded: "I do want to touch on it. I think . . . having a proportionality analysis, that it's important for me to do that. . . . it's appropriate for the Court to consider and for a proportionality analysis, when considering punishment." (Tr., p.251, L.23 - p.252, L.2, p.252, Ls.22-24.) With these statements, defense counsel clearly

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[9] For example, while maintaining continuity in terms of custodial status, the district court maintains discretion as to the length of the imposed sentence.

[10] Just because defense counsel recognized that general deterrence was a factor and made arguments in that regard does not mean that the factor is not flawed or that Ms. Skogen's other arguments in that regard were waived or that she invited any error in the district court's consideration thereof, as the State contends. (*See* Resp. Br., pp.5-6 n.2.) At the trial level, counsel had to operate within the established framework. At the appellate level, however, this Court can review the sentencing scheme and ensure it is still being applied properly. At the very least, by requesting that the district court impose a sentence properly "based on the factors outlined that the Court has to apply," (Tr., p.248, Ls.3-4), Ms. Skogen preserves any challenge to the subsequent improper consideration of those factors.

[11] The district court made its position in regard to that information clear as it imposed the sentence: "all cases are different. The sentences that may have been imposed in a different case that I'm not familiar with really don't mean a lot to me because the factual situations are always different." (Tr., p.257, Ls.7-11.) This refusal to consider these arguments and, particularly, the evidence supporting them, is also indicative of the district court's abuse of discretion in this case. "A trial court abuses its discretion if it unduly limits the information it considers before ruling upon an I.C.R. 35 motion." *State v. Izaguirre*, 145 Idaho 820, 824 (2008) (holding that, even though the evidence of the length of previously-imposed sentences in similar cases may not be directly on point, when it is relevant to the decision at hand, disregarding that evidence is an abuse of discretion). Here, the district court's disregard of such information prohibited it from being able to properly assess whether the sentence it was about to impose would

preserved all arguments relating to the need to consider these other cases, both in regard to general deterrence specifically, as well as the concept of punishment generally.

2. The District Court's Failure To Impose A Sentence That Was Consistent With Other, Similar Cases Undermines Any General Deterrent Value This Sentence Might Have, As Well As Any General Deterrent Value The Other Similarly-Based Sentences Might Have

There are several reasons why Ms. Skogen's sentence does not serve the general deterrence objective: the sentence is inconsistent with other similar sentences, depriving them all of the necessary consistency which forms the basis for any general deterrent effect they might have[12]; and, as the act seeking to be deterred is one based on the emotions of the moment, it is nearly impossible to provide an effective general deterrent for such actions.

First, it is necessary to provide consistency in sentencing in order for those sentences to have a general deterrent effect. Gary Kleck et al., *The Missing Link in General Deterrence Research*, Criminology, Vol. 43, No. 3, 2005, at 623, 647. General deterrence only works if the targets of that effect are able to predict the certainty, severity, and swiftness of the punishment. *Id.* Such predictions are only possible if there is certainty of arrest, the certainty of conviction, the certainty of imprisonment, certainty of duration of sentence, and certainty of swift punishment. *Id.* at 633-35.

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actually serve the objectives, particularly general deterrence, and thus demonstrates the abuse of its discretion.

[12] In addition, imposing such an inconsistent sentence impermissibly creates a special sentencing category for temporary care givers, such as babysitters, which is an independent abuse of discretion which violates the separation of powers between the branches of government. *See State v. Young*, 144 Idaho 646, 649 (Ct. App. 2006), *reh'g denied, rev. denied*; I.C. § 18-4006(1).

In the case of voluntary manslaughter, the statute establishes the certainty of duration of sentence by providing that a sentence shall not exceed fifteen years and a fifteen thousand dollar fine. I.C. § 18-4007. Within that range, the district court maintains its discretion to impose the appropriate sentence duration. Consistency in regard to the likely custodial status does not deprive the district court of its discretion in either of those respects (up to a fifteen-year sentence and fifteen thousand dollar fine). Therefore, the State's concern – that adopting Ms. Skogen's perspective will deprive courts of their discretion and instead lead to rigid exactness in sentencing – is unfounded. (*See* Resp. Br., pp.11-13.) As ever, the district court will have discretion in determining the severity of the sentence. Consistency does not undermine discretion.

However, if the district court wishes to impose a sentence for general deterrent purposes, it needs to ensure the other certainties, particularly certainty of imprisonment (or in this situation, as established in other cases, the certainty of non-imprisonment), remain intact. *See* Kleck et al., at 633-35, 647. As defense counsel noted, the public is only often aware of just the charge and the sentence imposed.[13] (Tr., p.253, L.22 - p.254, L.9.) Furthermore, in a state such as Idaho, where the pool of data for such comparisons is small, the detractive effect of outlier sentences on the concept of general deterrence is magnified to the point where the concept of deterrence becomes implausible and the deterrent effect miniscule. *See* Kleck et al., at 633. Therefore, when this district court imposed a sentence of imprisonment when numerous other district courts were imposing suspended sentences for similar (and at times, more

[13] This contention is confirmed by the data analysis explained by Gary Kleck and his co-authors. *See* Kleck et al., at 630.

egregious) acts,[14] the district court in this case deprived the potential targets of the general deterrent effect of the certainty regarding potential imprisonment.

When the public, the target of the general deterrent effect, looks at these other sentences, its conclusion would be that probation is the likely result in such cases. Yet the district court in this case imposed a significant prison sentence without any opportunity for probation (or even a period of retained jurisdiction, wherein the defendant may be able to demonstrate amenability to a probationary setting). Now, the public looking at these cases cannot be sure whether or not the result will be a prison sentence. Therefore, members of the public are unlikely to be able to effectively gauge the likely penalties for their potential actions and weigh them against the perceived benefit of their potential actions to determine whether they believe the actions are worthwhile. As such, this sentence is deprived of any general deterrent effect, as are all the other similar sentences.[15]

Furthermore, in the face of these other sentences, this sentence creates uncertainty within the law itself because it essentially establishes a *de facto* category of

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[14] The packet of cases provided by defense counsel details the decisions in many of those other cases, but a few are worth special consideration. First, Ms. Tiffany attempted to suffocate her child to quiet its cries, was unsuccessful, and then made a second attempt, which succeeded in quieting the child by killing it. *State v. Tiffany*, 139 Idaho 909, 911 (2004). She received a suspended sentence for her *deliberate* actions. *Tiffany*, CR-00-7677 (Judgment and Sentencing Disposition). Second, Ms. Nakaji killed her child in the heat of passion. *Nakaji*, CR-02-16548 (Amended Information). For her conviction of voluntary manslaughter, she received a suspended sentence. *Nakaji*, CR-02-16548 (Order Suspending Execution of Judgment and Sentence and Notice of Right to Appeal). Finally, Ms. Whittle severely abused an autistic child for whom Ms. Whittle had been appointed legal guardian, and her negligent "care" ultimately led to the child's death. *State v. Whittle*, 145 Idaho 49, 50 (Ct. App. 2007). Ms. Whittle was sentenced to probation for her culpability in the child's death. *Id.*

manslaughter which applies only to babysitters or others in positions of trust with regard to children. (*See* 3/11/11 Tr., p.259 Ls.19-22 ("There's certainly an aggravating factor here in that, Ms. Skogen, you were a baby-sitter of young [C.J.]. You were in a position of trust, and you abused that trust.").) Yet other persons placed in a position of trust (*i.e.*, legal guardians) may still get probation for far more abhorrent actions toward their charges.[16] *See, e.g., Whittle*, 145 Idaho at 50. This further undermines any continuity in regard to such sentences, which reduces any general deterrent impact they may have. As such, this creation of a *de facto* category of manslaughter for babysitters further evidences how this sentence fails to serve the objective of general deterrence.

Moreover, the argument in favor of general deterrence presumes that the person about to act is able to weigh the potential punishment against her action and determine whether she still believes the action to be worthwhile. That premise is nonexistent in a case of voluntary manslaughter, which is defined as "the unlawful killing of a human

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[15] For a noninclusive list of cases now deprived of general deterrent effect, see the packet of cases submitted by defense counsel.

[16] The fact that Ms. Whittle subsequently violated the terms of her probation is irrelevant to the point that, for her actions in regard to the death of her young charge, her sentence was suspended. While it is true that the Court of Appeals was not reviewing the propriety of such a sentence as her appeal was only timely from the revocation of probation, it did assert that "Under these circumstances, the sentence for felony injury to a child is not unduly harsh." *Whittle*, 145 Idaho at 52. Regardless, the fact that she received the sentence she did is the critical point – a legal guardian who abused her charge and neglected her obligations to keep the child safe from perilous situations was sentenced to probation. *See Whittle*, 145 Idaho at 50-51. Furthermore, the fact that her underlying sentence was longer than Ms. Skogen's only serves to demonstrate that even if the district court should ensure like custodial statuses in order to promote general deterrence, it still maintains its discretion as to the length of the underlying sentence. As such, this point undermines the State's prior argument, that accepting Ms. Skogen's perspectives in regard to the continued use of general deterrence as a sentencing factor will deprive the district courts of their discretion at sentencing. (*See* Resp. Br., pp.12-13.)

being . . . *upon a sudden quarrel or heat of passion*." I.C. § 18-4006(1) (emphasis added). By its very definition, a person about to engage in an act of voluntary manslaughter is not in a rational state of mind; rather, they are experiencing extreme emotion, reacting to a sudden quarrel or inflammatory event. *See id.* They are not acting with intent or malice. *See id.* And in that moment, they are not able to engage in the necessary weighing of costs and benefits necessary to create the general deterrent effect. *See* Kleck, et al., at 633-35. Therefore, in cases of voluntary manslaughter, general deterrence is an immaterial and ineffective concept. As such, a sentence of imprisonment in such a case cannot be based on that premise alone.

Therefore, even if the principle of general deterrence remains so revered that it can trump the district court's findings on the other sentencing objectives, particularly protection of society, and allow for imprisonment when the other factors indicate that imprisonment is inappropriate, this sentence does not serve that principle. As such, there is no justification to impose a sentence of imprisonment based on that premise. In fact, the statute in which the Legislature addressed such a consideration would suggest that based on the district court's findings, the presumption for probation has not been overcome. Therefore, under both the statutory and precedential formulations of the sentencing scheme, Ms. Skogen's sentence is revealed to be an abuse of the district court's discretion. This Court should remedy that abuse.

II.

The District Court Abused Its Discretion By Imposing An Excessive Sentence On Ms. Skogen

A. Introduction

In addition to its abuses of discretion in regard to its consideration of the sentencing objectives, the district court also abused its discretion by failing to sufficiently consider the mitigating factors in this case, or by erroneously finding aggravating factors. Only one such issue was addressed by the State in its Respondent's Brief: that the district court erroneously found an aggravating factor in the fact that C.J.'s parents were initially under suspicion for child abuse.

In regard to the arguments which it did contest, the State misconstrued Ms. Skogen's arguments by not considering the explanation of the factors. For example, it did not respond to Ms. Skogen's arguments that Dr. Hayes's explanations for her initial behavior needed to be considered alongside the fact that she was initially untruthful. Rather, the State merely contended that untruthfulness is an aggravating factor. (*See* Resp. Br., pp.14-15.) Similarly, it asserted that Ms. Skogen somehow disputed the fact that her actions led to the conclusion of potential child abuse when she contended that the district court was improperly considering the fact that the officer conducted a thorough investigation in aggravation against her, despite the fact that, even in that initial investigation, she provided evidence in the parents' favor. (*See* Resp. Br., p.15 n.5.) The State's arguments in this regard are overly narrow and miss the point of Ms. Skogen's contentions – in order to conduct a *sufficient* examination of

these factors, the district court needed to consider the entire factor, including the explanations in the record. Failing to do so constitutes an abuse of its discretion.

B. Because The District Court Did Not Sufficiently Consider The Numerous Mitigating Factors Present In This Case, It Imposed An Excessive Sentence In An Abuse Of Its Discretion

The State did not contest Ms. Skogen's demonstrations of the district court's failure to sufficiently consider the following factors: her lack of any prior record; her character as a trustworthy care provider for children both before *and since* the events of this case, as attested to by various witnesses; her lack of a need for rehabilitation or need for specific deterrence, as she is unlikely to commit such a crime again; and her substantial support network.[17] (*See generally* Resp. Br. (the only response to the mitigating factor arguments may be found on pages 14-15); *compare* App. Br., pp.30-34 (the explanations of these factors need not be reiterated here, but they are incorporated herein by reference thereto).) It also did not respond to her assertion that a sufficient consideration of these factors reveals a more lenient sentence was appropriate and, more importantly, that a period of probation would satisfactorily address all the sentencing objectives in this case.

As to the only of these arguments against which the State did provide a response, the State contends that the district court is not required to accept her explanation of the events in regard to her psychological state of mind during the initial hours of the investigation. (Resp. Br., pp.14-15.) That mischaracterizes Ms. Skogen's

[17] In her Appellant's Brief, Ms. Skogen referred to an offer of support from "her step-father (a police officer of over thirty years)." (App. Br., p.31.) She would like to be clear that the person to whom she referred is her father-in-law, not her step-father, and apologizes for the error.

argument, which was that the mere finding of the aggravating factor's existence in that regard was erroneous in light of the entire record. (*See* App. Br., pp.21-25.) The consideration of this factor is erroneous because, as Dr. Hayes explained, that reaction was natural, given the events that unfolded. (*See* App. Br., pp.21-25.) The State presented no contradictory evidence on that point, either before the district court or now. Additionally, the dishonesty that the district court found so abhorrent only lasted for a short duration (less than one day), before Ms. Skogen provided officers with a complete accounting, which has not materially changed since. (*See* App. Br., p.25.)

And while the State may be correct that the district court may consider the initial dishonesty in aggravation, it failed to sufficiently consider Dr. Hayes's accompanying explanation of the actions, which means that the district court insufficiently considered Ms. Skogen's mental condition when it imposed sentence. That is an abuse of discretion, since as the Idaho Supreme Court recognized, the sentencing court must consider a defendant's mental condition if it was a significant factor. *See, e.g., Hollon v. State*, 132 Idaho 573, 581 (1999). Since the district court made her untruthfulness a significant factor, it also needed to sufficiently consider her mental condition regarding that behavior in order to sufficiently consider the behavior itself.[18] As such, the district court abused its discretion by not sufficiently considering Dr. Hayes's evidence, whether or not it was free to disregard Ms. Skogen's explanation of the events. It still needed to consider the reasons for her behavior in order to sufficiently consider her

[18] Ms. Skogen's consultation with Dr. Hayes was aimed at evaluating her psychological, emotional and interpersonal functioning in regard to the events of this case. Dr. Hayes diagnosed her with General Anxiety Disorder and elements of other, related disorders. (Hayes Report, pp.1, 6.)

initial dishonesty as a sentencing factor. A sufficient consideration of the entire factor reveals that a more lenient sentence would be appropriate. (*See* App. Br., pp.21-27.)

The State also contends that Ms. Skogen's assertion that she was able to reconcile the events of that night within one day, and thus provide an accurate accounting of her actions, is somehow contradicted by the fact that the reconciliation occurred in response to officers confronting her with the failed polygraph results. (Resp. Br., p.14.) The State, however, appears to confuse "contradiction" with "explanation." Just because Ms. Skogen's reconciliation was triggered by the officer's confrontation of her story with the polygraph results does not undermine the reconciliation itself. Rather, it explains how Ms. Skogen was able to achieve the reconciliation and, thus, be forthright with officers within so short a time. (*Compare* 3/11/11 Tr., p.207, Ls.5-14 (wherein Dr. Hayes explained that such reconciliations can take years to occur and described a situation where it took the person some thirty years to achieve such a reconciliation).)

Additionally, the State criticized Ms. Skogen's argument in regard to the district court's consideration of the scrutiny placed on C.J.'s parents during the initial hours of the investigation. It decries her contention, saying: "[Ms.] Skogen cannot seriously dispute that her statements that C.J. just went limp were among the reasons C.J.'s parents were investigated . . . ." (Resp. Br., p.15 n.5:) Ms. Skogen does not, in fact, contest that C.J.'s injuries that night were part of the reason Dr. Celebreti initially suspected child abuse. (App. Br., p.26 (recognizing that the conclusion was a result of the consideration of various other already-healing injuries "in addition to the cranial injuries.").) However, the State conveniently omits to consider the other, already-

healing injuries in its attempt to demonize Ms. Skogen. (Resp. Br., p.15 n.5.) The fact that there were other injuries would naturally lead to the conclusion that someone may have been abusing the child on a long-term basis. The officer investigated the most likely suspects, as was his duty. The district court's consideration of this fact as only attributable to Ms. Skogen does a significant disservice to the officer, who would not have been doing his job properly if he had failed to initially consider all the possible explanations. Ms. Skogen's statements on their behalf should have been weighed as well, along with the fact that within twenty-four hours, she absolved them of the investigative scrutiny with her confession. If the district court is going to consider a factor, that consideration needs to be sufficiently thorough. *See, e.g., Cook*, 145 Idaho at 489-90; *State v. Shideler*, 103 Idaho 593, 595 (1982). A sufficient consideration means a consideration of all aspects of that factor, not just those the State believes noteworthy. By not sufficiently considering this factor, the district court's use of it in aggregation (particularly when most of the other factors in this case were mitigating) constitutes an abuse of discretion.

The district court failed to engage in a sufficient consideration of all the mitigating factors in this case. That insufficient consideration of the factors constitutes an abuse of discretion and caused the district court to impose an excessive sentence. *See id.* This Court should remedy that abuse.

CONCLUSION

If this Court finds that the district court erred in terms of its reliance on general deterrence alone or by not considering the information defense counsel submitted regarding the other similar cases from Kootenai County, Ms. Skogen requests that her case be remanded to the district court for a new sentencing hearing.

Alternatively, if this Court finds that the district court abused its discretion and imposed an excessive sentence, Ms. Skogen respectfully requests that this Court reduce her sentence as it deems appropriate.

DATED this 15th day of May, 2012.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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